

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JIMMY D. ECCLES**

Claimant

VS.

**STATE OF KANSAS**

Respondent

AND

**STATE SELF INSURANCE FUND**

Insurance Carrier

Docket No. 1,040,146

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the August 26, 2008, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Randy S. Stalcup, of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant did not sustain his burden of proving he suffered a work-related injury on February 13, 2008.<sup>1</sup>

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 26, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant contends that he sustained his burden of proving that he was injured on February 13, 2008, by an accident that arose out of and in the course of his employment with respondent. Claimant further asserts that he had just cause for not giving notice within

---

<sup>1</sup> Claimant alleged his date of accident was February 13, 2008, but he also testified that his accident occurred on a Thursday. February 13, 2008, was a Wednesday.

10 days of that injury. Accordingly, claimant requests the Board reverse the ALJ's preliminary Order and find that his workers compensation claim is compensable.

Respondent requests that the Board affirm the ALJ's preliminary hearing Order. Respondent denies that claimant sustained a work-related injury on February 13, 2008. In the event the Board finds claimant suffered a work-related injury on February 13, 2008, respondent argues that his claim is time barred because he failed to give timely notice and did not have just cause to extend the notice period.

The issues for the Board's review are:

(1) Did claimant suffer an accidental injury that arose out of and in the course of his employment with respondent?

(2) If so, did claimant have just cause to extend the notice period?

#### **FINDINGS OF FACT**

Claimant began work for respondent as a refrigeration and air conditioning technician in September 2007. He had a six-month probationary period. He testified that on February 13, 2008, he was working on a ladder that was pushed up against the ceiling. His head was against the ceiling, and he was bent over. He stretched as far as he could with his arms to remove a fan and motor assembly. When the fan came loose, the weight of it came down on him. The fan weighed approximately 20 pounds. There were no witnesses to the alleged incident. Claimant said he felt no pain or symptoms on that date.

The next day, February 14, claimant was informed by his supervisor, Gary Goldsmith, that he was being terminated for inadequate performance, with his effective date of termination being February 15. During the evening of February 14, 2008, he felt a pain in his lower left back area. He testified he thought he had a kidney infection or urinary tract infection, so he called his personal physician, Dr. John Hart, and made an appointment. He saw Dr. Hart on February 18, 2008, complaining of back pain that started the Thursday before. He did not give a history of injuring himself at work. Upon examination, Dr. Hart found that claimant had tenderness in his left paraspinal muscle area. Claimant testified that Dr. Hart took x-rays and told him he had scoliosis and recommended an MRI, which was performed on February 26, 2008. The MRI showed that he had a small posterior left paramedian disc protrusion at L1-2, as well as degenerative disc disease at all lumbar levels with disc bulging and end plate spurring at L3-4 and L4-5. The MRI also showed he had levoscoliosis of the lumbar spine.

Claimant had a follow up appointment with Dr. Hart on February 28, 2008. Upon hearing the results of the MRI, claimant associated the herniated disc with pulling the fan coil when working at respondent because that was the last strenuous activity he had done.

Claimant testified that he had not suffered any symptoms relative to his back in the month of February 2008 before the alleged accident date of February 13.

Claimant testified that the day after receiving the results of the MRI, February 29, 2008, he called Mr. Goldsmith and reported a work-related injury. Mr. Goldsmith told him he would need to go through human resources. The next business day, March 3, claimant called the human resources department and reported that he needed to file a workers compensation claim. He was told that the person who took care of those claims was not in the office. He was told to schedule an appointment, which he did. The appointment was on March 7, at which time he filed a claim. Claimant admitted that he knew that he was to immediately report a work-related injury to his supervisors. Respondent referred him to the Wichita Clinic for treatment but later denied his workers compensation claim.

On cross-examination, respondent's attorney asked claimant if he had any problems with his back in January 2008, and claimant denied having any. When shown a report from Dr. Hart dated January 10, 2008, that indicated claimant had chronic lumbar back pain, he said he did not remember that. Dr. Hart's report of that day indicated that "patient has not had an MRI in some time and we may well need to do this."<sup>2</sup> Claimant admitted that he and Dr. Hart did discuss his need for an MRI of his lumbar spine on January 10, 2008. Respondent's attorney further questioned:

Q. [by respondent's attorney] You had ongoing chronic back problems for months before January 10th of 2008, correct?

A. [by claimant] Yes.<sup>3</sup>

Upon redirect examination, claimant testified that he saw Dr. Hart in January 2008 to get his prescriptions renewed for Neurontin, which he was taking for a pinched nerve in his hip. He said it was his hip, not his back, that was bothering him before his alleged accident of February 13, 2008. Claimant also testified that he did not relate his condition to his work activity until his February 28, 2008, visit with Dr. Hart, and that was the reason for his delay in reporting his injury to respondent.

Respondent, in its brief to the Board,<sup>4</sup> contends claimant was seen by Dr. Hart on February 7, 2008, approximately six days before his alleged accident. At that time, Dr. Hart noted claimant was "exquisitely tender in the left paraspinous muscle area."<sup>5</sup> He

---

<sup>2</sup> P.H. Trans., Cl. Ex. 1 at 2.

<sup>3</sup> P.H. Trans. at 22-23.

<sup>4</sup> Respondent's Brief at 3 (filed Sept. 30, 2008).

<sup>5</sup> P.H. Trans., Resp. Ex. 1 at 3.

diagnosed claimant with a "[p]robable low back strain."<sup>6</sup> While these quotes and the February 7, 2008, date of entry are supported by the medical records contained within Respondent's Exhibit 1, the more complete medical records contained in Claimant's Exhibit 1 show that this entry probably referred to the claimant's office visit with Dr. Hart on February 18, 2008, which was after the alleged date of accident.<sup>7</sup> Nevertheless, there is evidence of preexisting back problems because Dr. Hart's office chart entry of January 10, 2008, notes "[c]hronic lumbar back pain," and "[c]ervical back pain as well as lumbar" and suggests an MRI be done.<sup>8</sup>

Gary Goldsmith, respondent's physical plant supervisor, testified he was claimant's supervisor. He said he received a call from claimant on his cell phone wherein claimant was alleging a workers compensation claim. He told claimant to contact human relations. Although claimant testified he made this call on February 29, 2008, Mr. Goldsmith said he checked his records, and he actually received the call on March 7, 2008. Mr. Goldsmith said he made a mental note when speaking with claimant that the call was three to four weeks after claimant's termination. Although he made a written note about the call, he was unable to locate the note. He also testified that he called human resources himself after talking to claimant.

#### **PRINCIPLES OF LAW**

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>9</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>10</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection

---

<sup>6</sup> *Id.*

<sup>7</sup> P.H. Trans., Cl. Ex. 1 at 2.

<sup>8</sup> *Id.*

<sup>9</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>10</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>11</sup>

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

In considering whether just cause exists, the Board has listed several factors which must be considered: (1) the nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually; (2) whether the employee is aware he or she has sustained an accident or an injury on the job; (3) the nature and history of claimant's symptoms; and (4) whether the employee is aware or should be aware

---

<sup>11</sup> *Id.* at 278.

of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>12</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>13</sup>

### **ANALYSIS**

The compensability of claimant's unwitnessed alleged accident turns primarily on his credibility. Claimant testified that he did not report an accident on the day it occurred because he did not experience any symptoms until later. This is suspicious. Likewise, it is suspicious that claimant contends he did not report his accident the next day either when he met with his supervisor because his symptoms did not start until the evening after he was terminated. Therefore, claimant reported a work-related accident only after he had been terminated by respondent.

Although there is support in the medical records for claimant's assertion that he believed he had a kidney infection, claimant was not forthcoming about his preexisting back condition or his recent prior medical treatment for his back. The records also show that claimant's symptoms preexisted his alleged date of accident. Given that claimant did not experience any symptoms on the day of the alleged injury, it is unlikely that the event he described was the cause of his injury.

### **CONCLUSION**

Claimant has failed to prove that he suffered personal injury to his back on February 13, 2008, or February 14, 2008, by an accident that arose out of and in the course of his employment with respondent.

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated August 26, 2008, is affirmed.

**IT IS SO ORDERED.**

---

<sup>12</sup> K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>13</sup> K.S.A. 2007 Supp. 44-555c(k).

Dated this \_\_\_\_\_ day of November, 2008.

\_\_\_\_\_  
HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant  
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge